IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN E. EICHMAN, ET AL.,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, ET AL.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR JASPER JOHNS, CLAES OLDENBURG, PAUL CONRAD, OLIVER STONE, COOSJE VAN BRUGGEN, HANS HAACKE, IRVING PETLIN, FAITH RINGGOLD, JENNY HOLZER, MICHAEL GLIER, NANCY SPERO, LEON GOLUB, SOL LEWITT, CARL ANDRE, JON HENDRICKS, AND RICHARD SERRA, *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA,

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No. 89-1434

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—v.—

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Jasper Johns, Claes Oldenburg, Paul Conrad, Oliver Stone, Coosje van Bruggen, Hans Haacke, Irving Petlin, Faith Ringgold, Jenny Holzer, Michael Glier, Nancy Spero,

Leon Golub, Sol LeWitt, Carl Andre, Jon Hendricks, and Richard Serra submit this brief as *amici curiae* in support of appellees in both cases. The parties to these actions have given their written consent to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF THE *AMICI*

The *amici curiae* are fourteen renowned artists, one Pulitzer Prize-winning editorial cartoonist, and one Oscar-winning motion picture director and producer. With some variation, these are the same *amici* who filed an *amici curiae* brief in *Texas v. Johnson*, 109 S. Ct. 2533 (1989) ("*Johnson*/Artists' Brief").

The artists' work—sculpture, paintings, constructions, prints, performances, editorial cartoons, motion pictures—represents visual artistic expression in a variety of media and exemplifies the major artistic movements since the 1940s: Abstract Expressionism, Minimalism, Pop Art, Conceptual Art, Performance Art, Political Art, and Feminist Art. Works of these artists are parts of the permanent collections of major museums in the United States and abroad, including the Museum of Modern Art and the National Gallery of Art, and many of the *amici* have exhibited, singly and in group shows, in museums throughout the world. Several have been American representatives to the Venice Biennale, most have participated in one or more Documenta International Exhibitions in Kassel in the Federal Republic of Germany, and nearly all have exhibited in the Biennial at the Whitney Museum of American Art. In addition, several *amici* have received major fellowships and awards.

Many of the *amici* have used flags in their work. Two of them, Faith Ringgold and Jon Hendricks, were convicted of violating New York's flag desecration statute when they organized a 1970 exhibition of works using the American flag. The works of several other *amici* were shown in that exhibition.

The work of visual artists is meant to be seen, and although artists may use words as part of their expression, they usually communicate through the use of recognized images, many of which are symbolic. Elimination of any symbol from the visual vocabulary, especially one as powerful and eloquent as the American flag, necessarily impoverishes the expressive vocabulary and stifles the creative process. The Federal Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777, has just such an inhibiting effect. Accordingly, the *amici curiae* share a deep concern that the government not subvert *Johnson* with a so-called content-neutral statute which criminalizes expressive conduct that *Johnson* held to be protected by the First Amendment.

SUMMARY OF ARGUMENT

The Flag Protection Act of 1989, which amended 18 U.S.C. § 700, makes it an offense to mutilate, deface, physically defile, burn, maintain on the floor or ground, or trample any flag of the United States. *Amici* contend that the statute as applied to artistic expression like theirs violates the First and Fifth Amendments because it is vague, overbroad, content based, and not justified by any compelling interest.

I. Due process requires that people not be required to guess at the meaning of a criminal statute. Yet several terms of amended Section 700—"flag of the United States," and most of the proscribed acts—are vague and require such guesswork.

A. In particular, the definition of "flag of the United States" is too vague to permit an artist to determine what it encompasses. It is unlikely that the statute is restricted to "official" flags because if that were its intent, Congress could have said so in unmistakable terms. Nor can an artist assume from the statute that it excludes pictures or representations of flags, and to do so would lead to absurd results. The Senate and House Reports are equivocal about the definition of flag. Because the original Senate bill never intended

to change the prior broad definition, its report does not address the issue. The House Report, although purporting to define "flag," does not resolve the artist's definitional dilemma, because its rationale for excluding some flags does not make sense and avoids any mention of the bulk of artistic work.

B. The statute's description of the proscribed conduct is similarly confusing. Does "trampling" include stepping or walking on a flag, and does "mutilating" include a partially created flag? "Deface" includes the meaning "to mar," and "defile" includes the meaning "dishonor," both of which are inherently subjective.

Because its essential terms are so vague, Section 700 neither sufficiently describes a flag nor the proscribed conduct. The result is that artists seeking to avoid prosecution are likely to censor their own work and forgo creating protected expression. In addition, enforcement of the statute is left to the personal interpretations of law enforcement officers, juries, and judges, contrary to the Fifth Amendment's due process requirements.

II.A. The flag desecration statue is overbroad because it reaches a substantial quantity of the clearly protected expression of artists who employ a flag or the image of a flag.

B. In the context of protected artistic expression, the flag desecration statute violates the First Amendment because it is content based but not justified by any compelling interest. It is evident from the statute's face that it is intended to criminalize expressive uses of the symbol of the flag that dishonor the flag and what it represents to the majority. First, it exempts conduct which accomplishes a specific purpose—disposal of worn or soiled flags—thereby exempting the traditional, respectful form of flag disposal. Second, some of the proscribed conduct is described with verbs normally used to describe disrespectful conduct. Other proscribed conduct has no effect on the physical integrity of flags—the asserted governmental interest—and was explicitly chosen to suppress protected artistic expression. The legislative history corroborates what is clear from the statute's language—that it is content based.

Because the statute is content based, it survives only if the government advances a compelling interest to justify it. The government does not. No one explains what interest the government has in the physical integrity of all flags—in all its manifestations—in the private possession of the people. Even if a flag is destroyed, the nation's interest in the flag as a symbol is not jeopardized. More importantly, the government does not supply the compelling justification for interfering with free speech. Finally, there is no support for exempting the flag from the First Amendment. Indeed, doing so would mirror some of the more disgraceful moments of our history when the flag has been used as an icon by political movements that attempted to ostracize ethnic, racial, or philosophical minorities. The flag as a symbol of our nation best represents the essence of America when it protects the freedom to express diverse views, including those that are unorthodox.

ARGUMENT

I

THE FEDERAL FLAG DESECRATION STATUTE IS UNCONSTITUTIONALLY VAGUE

The Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777 ("Flag Protection Act"), amended 18 U.S.C. § 700 ("Section 700" or "the flag desecration statute") to read in pertinent part:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

"Due process requires that all 'be informed as to what the [government] commands or forbids,' and that '[people] of common intelligence' not be forced to guess at the meaning of the criminal law."[1]

The flag desecration statute violates the Due Process Clause of the Fifth Amendment because several of its terms—"flag of the United States," "mutilates," "defaces," "physically defiles," and "tramples"—are insufficiently clear to give the requisite constitutional notice of what conduct is forbidden. *Goguen*, 415 U.S. at 572-73. This vagueness threatens to inhibit the creative process of artists who use the flag as a form of expression, by forcing them to refrain from creating even protected works for fear of risking criminal penalties. *See Baggett* v. *Bullitt*, 377 U.S. 360, 361, 372-73 (1964) (invalidating an oath required of school teachers that they would "by precept and example promote respect for the flag and the institutions of the United States and the State of Washington" because its vagueness might impel them to steer wide of the unlawful zone and forgo protected speech).

Not only does the statute chill artists' creativity, but it ignores what this Court has characterized as the "more important aspect of the vagueness doctrine . . . '—the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), quoting *Goguen*, 415 U.S. at 574. Because its terms are so vague, the statute facilitates arbitrary and discriminatory enforcement by law enforcement officers, prosecutors, and juries, unfamiliar with artistic expression that relies upon symbolism. *Lawson*, 461 U.S. at 358; *Goguen*, 415 U.S. 575.

1 *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974), quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939), and *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

In circumstances like this, "[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Goguen*, 415 U.S. at 573.

A. What Is A "Flag Of The United States"?

1. "A flag may be considered from two aspects: (1) as a physical object, and (2) as a symbol of ideas."[2] Part of the difficulty of interpreting the meaning of "flag of the United States" is related to this dual function.

As physical property, the government's flags, whether those flown over government buildings or particular historical flags maintained in the Smithsonian Institution, are like other government property, whether office or historic buildings, such as the Lincoln Memorial or the Tomb of the Unknown Soldier, or particular historical documents in the National Archives, such as the Constitution or the Declaration of Independence. The physical integrity of all such government property is treated the same—through criminal statutes proscribing injury to or destruction of government property, *e.g.*, 18 U.S.C. §§ 1361, 1363. *See*, *Goguen*, 415 U.S. at 594 (Rehnquist, J., dissenting).

But flags are also symbols. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943). "Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech or

2 *State* v. *Spence*, 5 Wash. App. 752, 490 P.2d 1321, 1323 (1971), *rev'd*, 81 Wash. 2d 788, 506 P.2d 293 (1973) (en banc), *rev'd*, 418 U.S. 405 (1974).

gestures." *Goguen* v. *Smith*, 471 F.2d 88, 99 (1st Cir. 1972), *aff'd*, 415 U.S. 466 (1974).

It is the essence of a symbol that it can be endlessly duplicated. Whatever its form, and even if any one particular representation is destroyed, the symbol does not lose its expressive force so long as people associate with it ideas or institutions. If the association is strong, the symbol's power continues so long as anyone is capable of imagining it, and any effort to destroy the association by destroying the symbol will be futile. *See Texas* v. *Johnson*, 109 S. Ct. 2533, 2547 (1989). Thus, so long as the flag's association with its referent remains in a person's mind, destruction of any one flag does not destroy the symbolism.[3] *Goguen*, 415 U.S. at 587 (White, J., concurring) (destruction of any one flag does not "interfere with its design and function").

The stars and stripes are indisputably a powerful symbol of America, that very strength accounting for the extraordinary variety of the flag's meanings as a symbol: patriotism, imperialism, capitalism, freedom. "It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America—in all its marvelous diversity." *Parker* v. *Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971) (three-judge court).

The art history of the United States is rich with images of the flag, including work of varied kinds in the fine arts, poster and graphic arts, folk art, the art of the editorial cartoonist, and motion pictures.[4] Although a flag may symbolize

3 "Semanticists know that the word is not the thing; the symbol is not the referent. The four-letter word 'flag' is not the piece of cloth itself; nor is that cloth with the stars and stripes the freedom it signifies; nor is the Fourth of July the actual spirit of independence." W. Safire, *Fourth of July Oration*, N.Y. Times, July 3, 1989, at 19, col. 6 ("Safire").

4 *See, e.g.*, *Johnson*/Artists' Brief, App. 3a-21a; K. HINRICHS, STARS & STRIPES (1987) (lodged with the Court to accompany the *Johnson*/Artists' Brief) ("HINRICHS"); B. MASTAI AND M.D. MASTAI, THE STARS AND THE

the United States, it has served, because it is so well recognized, to convey other concepts as well.[5] The sentiments expressed may be positive, critical, whimsical, or just nonsensical. Whatever its meaning, however, the flag has served as a vehicle of artistic expression.

2. Against this background of the flag as a symbol, we consider the meaning of "flag" in Section 700. Although the statute imposes criminal penalties for desecrating "any flag of the United States," the statute provides little guidance about what is included in that term. However, the diversity of the flag's symbolism imposes upon Congress a heavy burden of describing the offense with sufficient precision so that artists need not speculate whether their work risks criminal prosecution and police officers do not enforce it arbitrarily.

It is unlikely that "any flag of the United States" is intended to apply only to "official" U.S. flags, because Congress could have said that in unmistakable language. Moreover, given the wide historical variation of U.S. flags, that limitation is unhelpful.[6] Without clarification, it would be

STRIPES: THE AMERICAN FLAG AS ART AND AS HISTORY FROM THE BIRTH OF THE REPUBLIC TO THE PRESENT (1973) ("MASTAI"), and its extensive collection of flag art; Oliver Stone's *Born on the Fourth of July* (Universal Pictures 1989) (which includes newsreel footage of a flag burning during anti-war demonstrations in Chicago, Illinois); *Common Ground* (CBS television mini-series, March 25, 27, 1990) (recreates flag burning during riot and flag used as bayonet during demonstration, both associated with school integration order); *see also* Petition for a Writ of Certiorari, Exhibits A-J, *Long Island Vietnam Moratorium Committee* v. *Cahn*, No. 69-709 (U.S. S. Ct. filed Sept. 16, 1970) (historical examples of flag used in political contexts) ("*Vietnam Moratorium* Petition").

5 *See, e.g.*, H. ROSENBERG, *Jasper Johns: "Things the Mind Already Knows,"* THE ANXIOUS OBJECT 177 & n.* (1966) (" 'I went on [from the American flag] to similar things like targets, things the mind already knows, that gave me room to work on other levels' ").

6 That Americans accepted a wide variety of designs as "the flag of the United States" (*see generally* MASTAI, *supra* note 4) was highlighted by

perilous for an artist to assume the statute excludes technically incorrect portrayals of the flag, *e.g.*, flags with 47 stars or twelve stripes, which most people would recognize as American flags.

Nor could an artist assume that the words "in a form that is commonly displayed" exclude pictures or representations of the flag.[7] For most, a flag is a flag whether it is three-dimensional or two-dimensional. To say otherwise leads to absurd results: a picture of a flag on a magazine cover is not a flag, but becomes one when cut out and attached to a stick.[8] The conclusion that depictions of flags are included is reinforced by the statute's references to flags "made of any substance" and "of any size."

The congressional reports accompanying the legislation are equivocal at best. The Senate Report says nothing about the definition of "flag," probably because the Senate bill (S. 1338, 101st Cong., 1st Sess. (1989)), unlike the House bill (H.R. 2978, 101st Cong., 1st Sess. (1989)) ultimately considered by the Senate, proposed no amendment of Section 700's prior expansive definition of "flag of the United States,"[9] which included pictures and representations of flags.[10] Thus, the Senate Report provides an artist no guidance about the meaning of "flag of the United States."

The House Report, though purporting to address the definition of "flag," does not resolve the artist's dilemma. While asserting that the statute does not reach "a disposable paper cup or napkin with a flag printed on it," "depictions such as *photographs of flags on magazine covers* or products with flags printed on them," "a cake in the shape of a flag," and "flag designs on clothing, *artistic renditions of flags in publications*, and commercial and *political uses of the flag*,"[11] its explanation for these exceptions is perplexing. The House Report first categorizes these examples as "decorative representations"—never explaining how the examples in the passages italicized above could be described as "decorative." *Id.* Then, declaring that these examples are "not actual flags in that they are not commonly displayed as flags and have other uses," it summarily concludes that Section 700 avoids any definitional problems.[12] *Id.* at 11-12.

Representative Wendover when he introduced his resolution in 1818 for the establishment of a regulation flag design:

> I would refer you to the flag at this moment waving over the heads of the Representatives of the nation, and two others in sight, equally the flags of the Government: while the law directs that the flag shall contain fifteen [stripes], that on the hall of Congress, whence laws emanate, has but thirteen, and those at the Navy Yard and Marine Barracks have each at least eighteen stripes. Nor can I omit to mention the flag under which the last Congress sat during its first session, which, from some cause or other unknown to me, had but nine stripes.

S.M. GUENTER, THE AMERICAN FLAG, 1777-1924: CULTURAL SHIFTS FROM CREATION TO CODIFICATION 47 (to be published by Associated University Presses, Cranbury, N.J., Summer 1990) ("GUENTER"). John Paul Jones's 1779 flag sported tricolored stripes—alternating red, white and blue. *Id.* at 33.

7 It would also be conjecture to assume that "in a form that is commonly displayed" is meant to exclude flags (albeit recognizable as United States flags) created in unorthodox media or designs—*e.g.*, a flag painted on a man's face (*Johnson*/Artists' Brief. App. 4a), or depicted in strange colors (*id.* at 11a), or incorporating the flag designs of other countries (*id.* at 16a).

8 If the statute were intended to include only three-dimensional flags, it would also be subject to equal protection challenge, because of its discriminatory impact upon those artists—sculptors, actors, motion picture producers and directors—whose work necessarily occurs in three dimensions.

9 *See* S. REP. No. 152, 101st Cong., 1st Sess. 16 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 610, 625 ("S. REP."). The Senate took up the bill that the House had already passed and amended it. 135 CONG. REC. S12,573 (daily ed. Oct. 4, 1989) (Sen. Biden); *id.* at S12,601 (Sen. Biden); S12,607-08 (Sen. Dole); S12,616 (Sen. Wilson); *id.* at S12,654-55 (daily ed. Oct. 5, 1989).

10 One of Senator Metzenbaum's minority views of the statute assumes that the definition encompasses depictions of the flag. S. REP., *supra*, at 20.

11 H.R. REP. No. 231, 101st Cong., 1st Sess. 11 (1989) (emphases added) ("H.R. REP.").

12 Valarie Goguen failed to convince the Massachusetts Supreme Judicial Court that the flag sewn to the seat of his pants was not a "flag of the United States." *Goguen*, 415 U.S. at 579 n.24, 570 n.3. We assume that Con-

This baffling explanation, which avoids any reference to artistic work not in publications, provides no meaningful criteria for determining whether artistic work is encompassed by the statute and is thus incompatible with due process. Even if an artist or policeman knew of this legislative history, it is unlikely that it would relieve either of the need to guess at what Congress intended,[13] especially where the face of the statute gives no hint of such intent.

B. Section 700's Conduct Words Are Also Vague

Section 700(a)(1) proscribes conduct in terms that are also too vague to survive due process scrutiny. Consider, for example, the definitions of "trample": "to tread heavily so as to bruise, crush or injure; to inflict injury or destruction; to press down in walking; to extinguish by stamping with the feet." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2425 (1981) ("WEBSTER'S"). Could one who tip-toes across or stands stocking-footed on the flag safely conclude that he has not trampled it?[14]

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gress is not trying to make a distinction between "flag designs on clothing" and miniature flags sewn onto clothing. *But see Hoffman* v. *United States*, 445 F.2d 226, 229 n.9 (D.D.C. 1971) (noting that Hoffman's flag shirt was not a flag and observing that when injury is to a simulated design, proof of violation must be clearer); *id.* at 230 (MacKinnon, J., concurring) (rejecting the idea that Congress intended to criminalize putting a political button on a "*shirt resembling a flag*").

13 Moreover, the legislative history raises even further problems about what is a flag. The rationale of the House and Senate for why there is no objection to burning a worn or soiled flag is that it is "no longer a fitting emblem for display." S. REP., *supra*, 4 n.2; H.R. REP., *supra*, at 9. This may mean that a worn or soiled flag is not a "flag of the United States." Yet no one would deny that, despite its condition, the worn and tattered remnants of Ft. McHenry's Star Spangled Banner displayed in the Smithsonian Institution is a flag. Unfortunately, neither the Senate nor House Report provides wear or soil guidelines so that artists can determine at what point a flag is not a flag and may be used as a part of artistic expression without fear of prosecution.

14 *See People* v. *Meyers*, 23 Ill. App. 3d 1044, 321 N.E.2d 142, 143 (1974) (holding that stepping is not "trampling" as proscribed in state flag desecration statute).

(*footnote continued*)

"Deface" involves another semantic problem. It means "to destroy or mar the face or external appearance of" something. WEBSTER'S at 590. Depending on the subjective meaning of "mar," this definition could reach any artistic work that varied the appearance of the flag, such as using a skull and crossbones instead of stars or the word "nigger" instead of stripes (*Johnson*/Artists' Brief App. 12a, 15a), or that superimposed images on the flag (*Johnson*/Artists' Brief App. 18a). *See* 135 CONG. REC. S12,618 (daily ed. Oct. 4, 1989) (Sen. Biden). Yet among vexillologists, the term "defaced" refers, with no pejorative sense, to "a flag which has had a special emblem added."[15] Thus, the statute introduces confusion by criminalizing an accepted practice involving flags.

"Mutilate" means "to cut off or permanently destroy a limb or essential part of; to cut up or alter radically so as to make imperfect." WEBSTER'S at 1493. Is a flag mutilated if, instead of cutting off a piece of it, an artist draws or paints a flag but omits a portion of it? Or is that depiction just not a flag? It is also difficult to reconcile "mutilate" with the definition of "flag" which includes "any part thereof."

Another textual quagmire is "physically defile." Its meanings include "to corrupt the purity or perfection of; to make ceremonially unclean; to tarnish, dishonor." WEBSTER'S at 592. Assuming that "physically" is meant to distinguish verbal abuse of the flag (*see* 135 CONG. REC. S12,616 (daily ed. Oct. 4, 1989) (Sen. Wilson)), the statute nevertheless

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In 1989, appellee Scott Tyler exhibited at the School of the Art Institute in Chicago an installation entitled *What is the Proper Way to Display a U.S. Flag?*. The installation invited viewers to write their thoughts in books that were part of the installation. Because there was a flag in front of the books, some people unavoidably stepped onto it in order to record their responses. One such viewer was charged under the state flag desecration statute that proscribed "trampling," but the state finally declined to prosecute. *People* v. *Susan S. Willhoft*, 89-CR 10527 (Cook County Cir. Ct., Crim. Div., Nov. 29, 1989).

15 WHITNEY SMITH, THE FLAG BOOK OF THE UNITED STATES 294 (1975 rev.) ("SMITH").

embraces expression, including artistic expression, that could be interpreted as dishonoring the flag.[16] A word whose meaning depends on the interpretation of "dishonor" is too subjective and vague, and thus violates due process. *Boos* v. *Barry*, 485 U.S. 312, 322 (1988); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988).

The language of the flag desecration statute is too vague to permit artists to determine whether their expression is proscribed. The enforcement of the statute is therefore left to the personal interpretation of the police, judges, and juries, a result repugnant to the due process guarantees of the Fifth Amendment.

II

THE FLAG DESECRATION STATUTE IS OVERBROAD AND VIOLATES THE FIRST AMENDMENT

A. Section 700's Overbreadth Reaches Protected Artistic Expression

Although the government and its supporting *amici curiae* resolutely ignore all of Section 700 except its prohibition against burning flags, which they assume are always cloth banners, artists confronting this statute cannot ignore any part of the statute. Section 700 is overbroad because it sweeps into its orbit a substantial quantity of artistic activity protected by the First Amendment.[17] *Boos*, 485 U.S. at 329. Furthermore, even if the Court determines that Section 700 is not overbroad as applied to appellees' conduct, the statute is nevertheless amenable to facial attack because it is "so broad as to reach the protected speech of third parties." *Johnson*,

16 That could include Jasper Johns's poster *Moratorium* (*Johnson*/Artists' Brief App. at 11a); or Paul Conrad's *The American Way of Death*, which depicts lines of cocaine being cut on a flag (*id.* at 10a); or a flag painted on a man's face (*id.* at 4a).

17 In making this assessment, the vagueness of the statute, because it lends itself to a broader statutory reach, "affects overbreadth analysis." *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982).

109 S. Ct. at 2555-56 n.2 (Rehnquist, C.J., dissenting), relying upon *New York State Club Assn.* v. *New York*, 487 U.S. 1, 11 (1988).

No one seriously contests the proposition that an artist's work is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[ ]." *Spence* v. *Washington*, 418 U.S. 405, 409 (1974); *see Winters* v. *New York*, 333 U.S. 507, 510 (1948) (rejecting suggestion that First Amendment protects only expository and not creative expression); *United States ex rel. Radich* v. *Criminal Ct. of New York*, 385 F. Supp. 165, 175 (S.D.N.Y. 1974) (flag constructions that art dealer exhibited in gallery were "symbolic conduct of a nature closely akin to pure speech"). Moreover, the Court has long recognized that conduct relating to the use of flags may also be expressive. *Johnson*, 109 S. Ct. at 2539, and cases cited there. And, to the extent that some works of art use the flag to express political views, they fall into the category of "protest art" and follow in an "established artistic tradition."[18]

Given its vagueness, the flag desecration statute encompasses a substantial number of artistic creations using or depicting a flag as a means of expression. It would include all works using United States flags in the *Johnson*/Artists' Brief; the constructions at issue in *Radich*, 385 F. Supp. at 168; flag burnings in motion pictures or television movies that recreate political protests (*Born on the Fourth of July*; *Common Ground* (*see* note 4, *supra*)); and art exhibitions devoted to use of flags, such as the 1970 "The People's Flag Show" at the Judson Memorial church in Manhattan[19] or "Stars and Stripes," organized by the San Francisco chapter of the American Institute of Graphic Arts.[20]

18 *People* v. *Radich*, 26 N.Y.2d 114, 126, 308 N.Y.S.2d 846, 855, 257 N.E.2d 30, 37 (1970) (Fuld, C.J., dissenting), *aff'd by an equally divided Court*, 401 U.S. 531 (1971); *Radich*, 385 F. Supp. at 168-69.

19 *See Hendricks* v. *Hogan*, 324 F. Supp. 1277, 1279-80 (S.D.N.Y. 1971); The Village Voice, Nov. 19, 1970, at 1, 20-21.

20 *See*, HINRICHS, *supra* note 4, at Introduction.

Moreover, there is nothing speculative about the *amici*'s concern with the statute's overbreadth and their fear of prosecution for its violation. Artists and their dealers have been prosecuted under flag desecration statutes despite the clearly expressive content of their works.[21] Indeed, only last year when the work of one of appellees was exhibited in Chicago (*see* note 14, *supra*), the Art Institute was forced to defend a civil action by veterans organizations that sought to enjoin the entire exhibit until the piece was altered.[22]

Because Section 700 reaches a substantial quantity of the protected expression of artists (*New York State Club Assn*, 487 U.S. at 11), the statute "sweeps too broadly," *Gooding* v. *Wilson*, 405 U.S. 518, 527 (1972), and is invalid on its face.

B. Section 700 Cannot Survive After Texas v. Johnson

As *Johnson* made clear, once it is determined that artistic work using the flag is expressive, as it is, then whether the Court evaluates a statute regulating that artistic work under the more lenient standard of *United States* v. *O'Brien*, 391 U.S. 367 (1968), or subjects it to the "most exacting scrutiny" depends on whether the statute is related to the suppression of expression. *Johnson*, 109 S. Ct. at 2538 and 2543, quoting *Boos*, 485 U.S. at 321.

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21 *See, e.g., Radich*, 26 N.Y.2d at 126, 308 N.Y.S.2d at 855, 257 N.E.2d at 37 (Fuld, C.J., dissenting); *Radich*, 385 F. Supp. at 168; *People* v. *Keough*, 31 N.Y.2d 281, 338 N.Y.S.2d 618, 290 N.E.2d 819, *rev'g on nonconstitutional grounds* 38 A.D.2d 293, 329 N.Y.S.2d 80 (1972); *People* v. *Hendricks*, Crim. No. B36653 (N.Y. Crim. 1971) (convicting two of the *amici* for organizing the Judson Memorial Church flag show as a demonstration of support for Stephen Radich); *City of Chicago* v. *Barbara Aubin*, No. 89 CH 8763 (Cook County Cir. Ct., Chancery Div., Mar. 21, 1990) (declaring unconstitutional Chicago's 1989 Desecration of Flags ordinance and permanently enjoining its enforcement).

22 *Veterans of Foreign Wars* v. *The Art Institute*, No. 89 CH 1642 (Cook County Cir. Ct., Chancery Div. Mar. 3, 1989) (court held disputed work was protected expression under the First Amendment).

1. *Section 700 is Content Based*

In these cases, the appellant does not speak with one voice. The government apparently concedes that Section 700 is content based because of the stated interest in protecting the symbolism of the flag "as the emblem of this Nation."[23] DOJ Br. at 28-29, quoting S. REP., *supra*, at 3. Senator Biden "generously assum[es]" (Br. 10) and the Senate apparently concurs (Br. 29-30 n.52) that the Flag Protection Act regulates expression, but they nonetheless maintain (Biden Br. 11-19; Senate Br. at 29-30 n.52), that it is a content-neutral means of promoting the legislative purpose of "protect[ing] the physical integrity of the flag" (S. REP., *supra*, at 4).[24]

However, it is evident from the statute's face and the congressional reports that the statute is intended to criminalize expressive uses of the symbol of the flag that dishonor the flag and what it represents. One need look no further than the face of the statute to see that its scope is not content neutral. *See Green* v. *Bock Laundry Machine Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring). Section 700(a)(1) proscribes, *inter alia*, the burning of a flag of the United States. Section 700(a)(2), however, exempts "any conduct consisting of the disposal of a flag when it has become worn or soiled." It is obvious that the provision is meant to except from criminal penalties the hortatory provision of 36 U.S.C.

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23 The government also argues (Br. 31-33) that concededly expressive conduct violating Section 700 is not entitled to First Amendment protection because like other "evils," such as child pornography, obscenity, and perjury, it does not contain sufficient incidents of speech to warrant protection. Not only has the Court already repeatedly recognized the communicative nature of expressive conduct (*Johnson*, 109 S. Ct. at 2539 and cases cited there), but we are astounded that the government sees any comparison between the artistic work at issue (*see, e.g.*, note 4, *supra*) and the "evils" it identifies.

24 Senator Biden's argument (Br. 13-16) that protecting "a symbolic object" does not make a statute content based overlooks the particular symbol at issue and the particular statute. Given the diverse meanings of the flag, a statute can hardly be called "neutral" when it forbids certain conduct in order to "recognize[ ] the diverse and deeply held feelings of the vast *majority* of citizens for the flag" (H.R. REP. *supra*, at 9 (emphasis added)).

§ 176(k), which recommends burning as a respectful way of disposing of a flag.[25] By making an exception for conduct that has been used traditionally to respect or honor the flag, Congress betrays its intent to exempt conduct expressing honor toward the flag,[26] but not conduct expressing disrespect or protest. Such a distinction cannot be sustained after *Johnson*.

Moreover, the words chosen to describe the proscribed conduct also reveal that the statute is content based. For example, the statute does not forbid "stepping" on a flag, only "trampling." It does not forbid "cutting of" or "removing" a piece of a flag, only "mutilating" it. The statute's words are "loaded," because they proscribe conduct with verbs that imply the display of disrespect or contempt. As Assistant Attorney General Barr observed, "These verbs were picked for a reason. They are things that people commonly do to show disrespect . . . ."[27] Congress's choice of such loaded words reveals the statute's intent to restrict certain kinds of expressive conduct. *See Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 623 (D.C. Cir. 1983) (Scalia, J., dissenting) (guarantee of freedom of expression "would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists."), *rev'd*, 468 U.S. 288 (1984).

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25 Indeed, the House and Senate Reports use very nearly the verbatim text of 36 U.S.C. § 176(k) to explain that such flag burning is permissible because a worn or soiled flag is "no longer a fitting image for display." S. REP., *supra*, at 4 n.2; H.R. REP., *supra*, at 9. *See* note 13, *supra*.

26 H.R. REP., *supra*, at 9 (to avoid prosecuting veterans "whom we really don't want to prosecute"); 135 CONG. REC. S12,612 (daily ed. Oct. 4, 1989) (Sen. Simpson: "We must be so careful not to prohibit 'innocent' desecrations of our national symbol.").

27 *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Committee on the Judiciary*, 101st Cong., 1st Sess. 116 (1989) (William P. Barr, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice).

Other statutory language demonstrates the statute's intent to suppress expression rather than merely to protect the physical integrity of flags. Despite the government's (DOJ Br. 39 n.32) and Senator Biden's (Br. 13) claims to the contrary, "maintaining a flag on the floor or ground," in no way impairs its physical integrity. This provision criminalizes what was formerly just an informal injunction to display respect for the flag by not permitting it to touch the ground. *See* 36 U.S.C. § 176(b). Nor is there the slightest doubt why this prohibition appears in the statute. Its proponent, Senator Dole, acted "in response to the exhibit" of appellee Scott Tyler at the Institute of Art in Chicago (*see* n. 14, *supra*), "and in response to the overwhelming public outrage generated by the exhibit." 135 CONG. REC. S12,607 (daily ed. Oct. 4, 1989). Manifestly, this statutory language was intended to suppress protected artistic expression.[28]

But it is "defile" that administers the coup de grâce to any claim that the statute is content neutral. As demonstrated (*see supra* pp. 13-14), its meaning includes dishonor or disrespect, thereby exposing the statute's link to expression. The House acknowledged that "defile" signifies lack of content neutrality when it omitted "defile" from the prior statute. H.R. REP., *supra*, at 8; *see* Biden Br. 5. However, Senator Wilson reintroduced the prohibition precisely because the statute, without "defile," would not reach "offensive" conduct upon "a symbol of nationhood or of national unity" which did not endanger its physical integrity. 135 CONG. REC. S12,616 (daily ed. Oct. 4, 1989). Senator Wilson's amendment sought to proscribe expressive conduct showing contempt for the flag—*i.e.*, to suppress certain symbolic speech. Indeed, explicitly recognizing that "defile" implicates protected speech, Senator Biden tried to dissuade Senator Wilson from making his amendment. *Id.* at S12,617 ("I do not want to give . . . anyone in the High Court the excuse to

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28 This particular language would also affect other artistic works, such as Herblock's *The All-Purpose Cover* (*Johnson*/Artists' Brief App. 19a) and Vito Acconci's *Instant House*, whose four flag-covered walls lie flat on the floor if someone does not occupy the swing-operated pulley that pulls them up (*id.* at 20a).

suggest that we have moved into the realm of speech."); *see id.* at S12,603.

If any doubt lingered that the statute on its face relates to expression, the legislative history removes it. Reacting to *Johnson*, Congress immediately sought a way to overturn it. Although claiming to protect the flag regardless of the expression intended by the proscribed conduct, Congress nevertheless disclosed that its true interest was the flag as "that one symbol of the spirit of our democracy."[29] S. REP., *supra*, at 5; H.R. REP., *supra*, at 9.

Thus, the statute on its face and its legislative history, corroborated by the floor debate, disclose that the Flag Protection Act is aimed at the suppression of expression, and the claim that the statute is content neutral is a sham. *See Wallace* v. *Jaffree*, 472 U.S. 38, 75 (1985). (O'Connor, J., concurring). The government's justification for the Flag Protection Act must therefore be subjected to the strictest scrutiny.

29 The extensive and well-attended floor debates show overwhelming evidence of the true intent of Congress. In the course of explaining their views, the Senators left no doubt that the protection of the "physical integrity" of the flag was a pretext for banning conduct that could be used to dishonor or desecrate the flag as a symbol of America and the patriotic feelings that it represents. *See e.g.*, 135 CONG. REC. S12,600 (daily ed. Oct. 4, 1989) (Sen. Gramm: "I cannot imagine a situation in which someone would desecrate the American flag other than to make a political statement about hating America and its great institutions. So I intend to vote for this bill."); *id.* at S12,610-11 (Sen. Reid: "I do believe it is my duty, and the duty of every American, to respect the flag . . . . I am proud . . . not only to profess my creed, but to take action in accordance with it."); *id.* at S12,591 (Sen. Gorton: the courts and people "will be able to distinguish between *true desecration*, a true and invalid attack on the flag of the United States, and a red, white and blue, herring prosecuted under this statute.") (emphasis added).

Nor did the Representatives conceal their true reason for endorsing the amendments to the federal flag desecration statute: to punish those who dishonor the flag. *See, e.g.*, 135 CONG. REC. H5511 (daily ed. Sept. 12, 1989) (Rep. Gephardt: the legislation is the "most effective . . . way to ensure that our national symbol is not desecrated."); *id.* at H5514 (Rep. Brennan: "If we allow the flag to be desecrated . . . we permit our national honor to be trampled upon as well."); *id.* at H5511 (Rep. Florio: "Anyone who dishonors the flag is trampling on the values for which the flag stands and should be punished.").

2. *No Compelling Interest Justifies Section 700*

To satisfy that strict scrutiny, the government must "show that its 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos*, 485 U.S. at 321, quoting *Perry Educational Assn.* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). No one disputes that the federal government has an interest in adopting a national flag (4 U.S.C. §§ 1-2), establishing customs for its use (36 U.S.C. §§ 173-178), ensuring that its use is not claimed exclusively by any one entity (15 U.S.C. § 1052(b)), and protecting property interests in government-owned flags. *See Johnson*, 109 S. Ct. at 2647. However, the government advances no compelling reason why these interests justify Section 700's proscriptions.[30] *Id.*

The interest advanced by the government, the Senate, and Senator Biden to justify Section 700 is the protection of the physical integrity of United States flags under all circumstances.[31] Yet no one has explained what possible interest the government has in the physical integrity of every flag—in all its manifestations—in the private possession of the people or why that interest is so compelling that it requires suppression of protected expression.[32] Even if particular flags are

30 Moreover, the suggestion that Section 700 can be characterized as a reasonable regulation of the manner of expression (Biden Br. 10-11) ignores the significant fact that "words are not always fungible, and that the suppression of particular words 'run[s] a substantial risk of suppressing ideas in the process.' " *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 532 (1987), quoting *Cohen* v. *California*, 403 U.S. 15, 26 (1971).

31 The Speaker and Leadership Group of the House of Representatives have filed a brief arguing (Br. 20) that the Flag Protection Act is required to preserve the flag as an incident of sovereignty and identification among nations. Not only can this interest, which was not even mentioned anywhere in the legislative history, not be advanced as a rationale for this legislation, but nowhere does the House ever explain why that interest justifies restriction of expressive use of the flag.

32 Moreover, "[t]o conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Johnson*, 109 S. Ct. at 2546.

destroyed, the nation's interest in the flag as a symbol of the country is not jeopardized, because destruction of any individual manifestation of the flag does not destroy the strong association of the flag as a symbol of America. The government's rhetoric about violence, assault and destruction[33] may stir emotions, but does not supply the compelling justification for interfering with free speech.

Rep. Skaggs asked "What is the governmental interest in protecting the physical integrity of the American flag in all circumstances?" 135 CONG. REC. H5509 (daily ed. Sept. 12, 1989). The closest answer he could find in the House Report and floor debates was the following (H.R. REP., *supra*, at 9):

> [The bill] "recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object. . . ."

In other words, as Rep. Skaggs observed, the government's interest was "to honor the sentiments of the vast majority by criminalizing the behavior of the minority who are expressing different sentiments." 135 CONG. REC. H5509 (daily ed. Sept. 12, 1989). The government confirms that this is the intent and effect of Section 700 (DOJ Br. 27, 35), but as the Congressman correctly observed: "that is, and should be, unconstitutional."[34] *Id.*

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33 *See, e.g.*, "physical, violent assault . . . on shared experiences" (DOJ Br. 23), "inherently destructive nature of flag burning" (*id.* at 24), "the violent assault on shared values" (*id.* at 27), "wanton, physical destruction of the American flag" (*id.* at 35). In addition, the government's characterization of burning a flag as "inherently destructive" (*id.* 24), overlooks the broad range of meanings that could be ascribed to such conduct, such as grief or despair as well as outrage and protest.

34 Similarly unacceptable is the claim (Biden Br. 23-25) that the Court has repeatedly rejected: that expressive use of the flag may be suppressed because the sentiments can be conveyed in some other way. *Johnson*, 109 S. Ct. at 2546 n.11; *Spence* 418 U.S. at 411 n.4; *see Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980). In any event, that an idea may be expressed verbally is cold comfort to an artist whose expression is visual.

Not only does the government's rationale not withstand strict scrutiny, but, even if the statute were held to be content neutral, it does not even survive *O'Brien*'s more lenient standard of furthering an important or substantial governmental interest.

Nor is there support for the position that the flag should be exempt from the First Amendment. *See* S. REP., *supra*, at 22 (minority views of Senators Hatch and Grassley); *Johnson*, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting); *id.* at 2555 (Stevens, J., dissenting). Although this idea is rooted in stirring and sentimental portrayals of the flag in the country's history, such history is incomplete and ignores the role the flag has played to promote political orthodoxy and exclude minorities.

There is no evidence that the Framers took any special interest in the flag except the utilitarian one of identifying the nation, and especially its ships, in the international community.[35] It was not until the Civil War that the flag began to be transformed into the nearly religious icon it later became. GUENTER, *supra* note 6, at 49-50, 64. Promoting the flag as a symbol of America really began with the Civil War, which forced Americans to choose between two flags, the Centennial, patriotic societies' increased promotion of the flag, and its enlarged role in the indoctrination of immigrant school children. *Id.* at 73-87, Chapter 5.

At the turn of the Twentieth Century, patriotic and other societies (*e.g.*, Daughters of the American Revolution, Sons of the Revolution, Grand Army of the Republic, Ku Klux Klan) spearheaded a drive for flag desecration legislation, but were unable to persuade Congress to enact it.[36] Congress's resistance arose from the dilemma of how to restrict flag use

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35 8 Journal of the Continental Congress 1774-1789, at 464 (Ford ed. 1907); GUENTER, *supra* note 6, at 29-30; SMITH, *supra* note 15, at 2.

36 GUENTER, *supra* note 6, at 143. One of the flag uses which particularly sparked the sponsors' ire was advertising. *See Halter v. Nebraska*, 205 U.S. 34 (1907). Indeed, justification for Section 700 is further undermined in view of the government's long acceptance of the flag's extensive and indiscriminate use in commercial advertising and its recognition that such use has not threatened the flag's status as a symbol of America.

without encroaching on practices it wished to preserve—including campaign flags bearing the names and images of candidates.[37] Defeated in their attempts to achieve federal flag desecration legislation, the patriotic and other societies turned to the state legislatures. GUENTER, *supra* note 6, at 143-146. Following the First World War, these organizations promoted adoption of the Civilian Flag Code, which was codified by the federal government in 1942, during wartime, as a hortatory code of flag conduct. 36 U.S.C. §§ 171-178. It took the Vietnam War, which divided the country and included anti-war flag burnings, to bring about in 1968 the first federal flag desecration statute.

The legislative struggles reflected attempts by many groups to appropriate the flag as a symbol for a particular viewpoint and to ostracize opponents of that position. This attempted appropriation of the flag as symbol has threatened at times to turn the flag into a fetish or icon and its display into a civil religion.[38] Disturbing examples of this behavior were the Know-Nothings, who identified their nativist, anti-immigrant sentiments with the flag,[39] and the Ku Klux Klan, which seized upon the flag as a symbol of its racial and religious bigotry (GUENTER, *supra* note 6, at 178-179; MASTAI, *supra* note 4, at 180). Indeed, even the Civilian Flag Code was partly motivated by virulent wartime, anti-foreigner, anti-Communist and anti-Anarchist sentiments.[40] *See also Strom-*

37 *See Vietnam Moratorium* Petition, *supra* note 4, at Exhibits D-J.

38 SMITH, *supra* note 15, at 83; GUENTER, *supra* note 6, at 182-85; *see* K. Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 945-46 (1990) ("Greenawalt"). *See also* Safire, *supra* note 3 ("Desecration is a word rooted in sacredness. Americans do not consecrate—make holy—our political signs and documents, nor can anyone 'desecrate' them.").

39 GUENTER, *supra* note 6, at 170; MASTAI, *supra*, note 4, at 27; *see Vietnam Moratorium* Petition, *supra* note 4, at Exhibit D (1844 campaign banner of the Native American Party with words "Native Americans. Beware of Foreign Influence" emblazoned on the U.S. flag).

40 GUENTER, *supra* note 6, at 167-70, 175-77; SMITH, *supra* note 15, at 80. *See also* S.M. Guenter, *Civil Religion As A Political Tool: Bush, Dukakis, and the Pledge*, 128 THE FLAG BULLETIN 161 (1988); *see also* S.M. Guenter, *The Hippies and Hardhats: The Struggle for Semiotic Control of the Flag of the United States in the 1960s*, 130 THE FLAG BULLETIN 131 (1989).

berg v. *California*, 283 U.S. 359 (1931) (red flag of Communist Party displayed as symbol of opposition to organized government); *Ex parte Starr*, 263 F. 145 (D. Mont. 1920) (defendant sentenced to hard labor for 10-20 years under Montana sedition law for refusing mob's insistence that he kiss the flag and for speaking "contemptuous" language about the flag: "What is this thing anyway? Nothing but a piece of cotton with a little paint on it and some other marks in the corner there.").[41]

To the extent that the Flag Protection Act would convert the flag into an exclusive symbol of what the majority wants to associate with it and ban expressive conduct "that is regarded as evil and profoundly offensive to the majority of people" (*Johnson*, 109 S. Ct. at 2555 (Rehnquist, J., dissenting)), the Act sanctions misuse of the flag to suppress unorthodox views and ostracize the unorthodox, in violation of the First Amendment.[42] Yet, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *Barnette*, 319 U.S. at 642.

41 "Patriotism is the cement that binds the foundation and the superstructure of the state. . . . But when, as here, it descends to fanaticism, it is of the reprehensible quality of the religion that incited the massacre of St. Bartholomew, the tortures of the Inquisition, the fires of Smithfield, the scaffolds of Salem, and is equally cruel and murderous." *Ex parte Starr*, 263 F. at 146.

42 To the extent that a flag desecration statute is a guise for suppressing criticism of the government, it resembles seditious libel and should be similarly rejected. *See Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153-54 (1967); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In addition, the government's plea that First Amendment rights should yield to "decency and civility in discourse" (DOJ Br. 37 n.29) would turn the First Amendment on its head by forbidding expression "simply because society finds the idea itself offensive or disagreeable." *Johnson*, 109 S. Ct. at 2544, and cases cited there.

Although the Court is now urged to bow to the pressure of Congress and the President and create an exception for the flag because of its special significance to the majority (DOJ Br. 41; Biden Br. 29), it is the same Court that has before reminded the majority and its elected representatives that "freedom to differ is not limited to things that do not matter much." *Johnson*, 109 S. Ct. at 2545. *See* Greenawalt, *supra* note 38, at 944.

The Court has been vigilant against efforts to censor particular expression, whether specific words (*Cohen* v. *California*, 403 U.S. 15, 26 (1971)) or symbols (*Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 510-11 (1969)). Otherwise, once government punishes the use of particular words or symbols deemed offensive to some, "government might soon seize upon the censorship of particular words [or symbols] as a convenient guise for banning the expression of unpopular views." *Cohen*, 403 U.S. at 26.

Although offered as a means of protecting the flag's physical integrity, Section 700 operates as a "convenient guise" for censoring unpopular views associated with expressive conduct involving the flag. Applied to artists, the statute would ban from their visual vocabulary a symbol "often chosen as much for [its] emotive as [its] cognitive force." *Id.* Protecting the flag's physical integrity is not a legitimate, let alone compelling, legislative interest, and it impermissibly abridges the First Amendment rights of artists.

CONCLUSION

The judgments of the United States District Courts for the District of Columbia and the Western District of Washington should be affirmed.

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